Crime of aggression in international law and international relations

Bandov, Goran; Ogorec, Dorotea

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:
Bandov, G., & Ogorec, D. (2020). Crime of aggression in international law and international relations. *Journal of Liberty and International Affairs*, *6*(1), 48-69. https://nbn-resolving.org/urn:nbn:de:0168-ssoar-67603-2

Journal of Liberty and International Affairs | Vol. 6, No. 1, 2020 | eISSN 1857-9760
Published online by the Institute for Research and European Studies at www.e-jlia.com

Peer review method: Double-Blind
Date of acceptance: February 28, 2020
Date of publication: May 04, 2020
Original scientific article
UDC 323.28:28
323.23:28-05(497-15)

Scan the QR code:

CRIME OF AGGRESSION IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Goran Bandov
University of Zagreb, Croatia
ORCID iD: https://orcid.org/0000-0003-4644-4582
gbandov[at]unizg.hr

Dorotea Ogorec
Central State Office for the Development of Digital Society, Croatia
ORCID iD: https://orcid.org/0000-0001-6765-5632
doroteaogorec[at]yahoo.co.uk

Abstract: *The paper focuses on the analysis of the problem of defining the crime of aggression in the international law and international relations, focusing primarily on the historical development of the term from its initial directed efforts, all the way to its modern outcomes. Observing in a historical manner, the establishment of the definition of the crime of aggression, as well as its aligning under criminal offences has encountered several obstacles which resulted in a continuous delay of clear defining what exactly would the crime of aggression encompass. In order to fully understand the matter, the importance of several international documents is undeniable, especially the Charter of the United Nations as well as the Rome Statute of the International Criminal Court.*

Keywords: *Aggression; Rome Statute; International Criminal Court; Responsibility*

HISTORICAL OVERVIEW OF CRIMINALISING AGGRESSION IN THE INTERNATIONAL LAW

The notion of the crime of aggression as it is defined in the modern period wasn't criminalized until 1945, when aggression was taken into consideration as an international crime for the first time, following the events in WWII (Cassese 2008 152). However, criminalizing concrete acts, which are encompassed by the term of the crime of aggression, finds its base as late as the consequences of WWI, which have a considerable influence on introducing the term of the crime of aggression in the international law, and consequential to that, also in the national jurisdictions.

The Period after the First World War

Causes and consequences of WWI left a series of questions and attempts to prevent similar occurrences in the future. A special influence on the development of the crime of aggression can be sought within two documents which emerged based on the experience which the countries had in WWI – the Treaty of Versailles 1919, and the 1933 Soviet Union's Draft Definition of Aggression.

The Treaty of Versailles in 1919

After WWI, a peace treaty between the Allies and Germany with which Germany accepts a complete responsibility for the war and with which specific conditions have been established for the lawsuit against the German army for the violation of the provisions of the law of war has been successfully concluded in Versailles in France (Sayapin 2014, 29). In so doing, the Article 227 of the Treaty is a key that contains the provision which states how the former German emperor Wilhelm II should be tried as a war criminal, to which Germany protested (Sellars 2016, 23).

The former emperor was characterized as a person responsible for committing "the highest violation against international morality and the sanctity of the Treaty" (Paulus 2004, 7). The importance of the provision is manifested in the indirect citing of the terms 'morality' and 'sanctity' within the scope of crime against peace alluding on the term of 'aggression', even though it is not explicitly stated, since the term of the crime of aggression was not defined nor acknowledged at the time (Sayapin 2014, 30). The Treaty of Versailles, especially the aforementioned Article 227 indicates the progress from the term 'crime against peace' towards a terminological transition and approximation to the term of 'crime of aggression' (Paulus 2004, 7). With that, a tendency towards defining related crimes into a distinct, more general term which directs towards listing the term under criminal acts in the following period is evident. The Treaty of Versailles also establishes the League of Nations, which, as an

international organization and the predecessor of the United Nations, has a significant role in strengthening the tendencies of defining the term of the crime of aggression, which will be approximated in a more concrete manner with the further analysis.

1933 Soviet Union's Draft Definition of Aggression

A more concrete attempt to set the definition of the crime of aggression has been proposed by the Soviet Union on the General Assembly of the League of Nations for Security Questions in 1933 (Bartman 2011, 425). Even though, as an independent concept, it does not represent an extraordinary nor in particular is a too important contribution to the general prohibition of the crime of aggression, its significant contribution to the very process of defining aggression undeniable.

The Draft stated how the aggressor in an international conflict shall be considered that state which is the first to take any of the following actions; declares a war against another state, invades by its armed forces the territory of another state without declaring war, bombards the territory of another state by its land, naval or air forces or knowingly attacks the naval or air forces of another state, lands in, or introduces within the frontiers of, another state of land, naval or air forces without the permission of the government of such a state, or infringes the conditions of such permission particularly as regards the duration of sojourn or extension of area and finally, establishes a naval blockade of the coast or ports of another state (*Lettonie – Russie - Traités et documents de base* n.d.).The aforesaid descriptions of acts, which embody the aggressor and assume the existence of the crime of aggression, are the basic contribution to concretization of the very definition of the crime of aggression.

The importance of the Draft is depicted in the continuous calling upon it in various resolutions, charters and acts (such as, for instance the Charter of the United Nations in 1945, the United Nations General Assembly Resolution 3314 in 1974 and the Rome Statue of the International Criminal Court in 1998, which shall be analyzed further in the article) and also is the basis of the modern definition of the crime of aggression, which this article analyses further on.

The Period after the WWII

The key period for establishing the modern definition of the crime of aggression is related to the WWII, as well as its post-war period. From the events that followed not long after the end of the WWII, the Nurnberg processes which encompass the German Nazis trials (primarily through forming and the activities of the International Military Tribunal at Nurnberg) as well as the work of the International Military Tribunal for the Far East within the Tokyo process, stand out as the most important according to the international law significance, all of which will be analyzed as follows (Sayapin 2014, 40-43).

France, UK, USSR and USA founded the International Military Tribunal at Nurnberg in the London agreement in 1945 (Andrassy; Bakotić; Lapaš; Seršić and Vukas 2010, 419), with the intention of punishing the responsible for the committed crimes (Carpenter 1995, 224). The mentioned Agreement contained the Statute of the Tribunal and the criminal provisions which were the legal basis in the Nurnberg processes. In the scope of the Nurnberg processes, Nazi defendants were burdened by the accusations for committing war crimes, crimes against humanity and crimes against peace, which in their definition, contained the phrase "conducting the war of aggression" (Carpenter 1995, 225).

The Statute of the International Military Tribunal at Nurnberg placed the acts of aggression under the term "crime against peace" (Lavers 2008, 300), further stating in the Article 6 that the term means "planning, preparation, initiation or waging of war of aggression, or war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" (International Committee of the Red Cross).

The mentioned definition points to the connection of the previously mentioned 1933 Soviet Union's Draft Definition of Aggression, drawing parallels with its provisions. Even though aggression was still not being concretized as a standalone crime, but rather the centre of aggression has been evidently categorized within the crime against peace and security, the mentioned actions indicate the efforts taken at the beginning of defining the modern term of the crime of aggression (Carpenter 1995, 226).

The importance of the Nurnberg processes is expressed also in the fact that not only was the crime of aggression beginning to be defined during the trial, but also the understanding developed of the aggression as a state crime, that is, the fact that aggression is a "paradigmatic crime of the state" (Carpenter 1995, 225; Crawford 1994, 147). With it, the necessity to separate, that is, in this particular case the inability to affiliate the responsibility of an individual and the responsibility of the state, became evident. Moreover, this was substantiated with the arguments of the lead British prosecutor Hartley Shawcross, concretely with the standpoints how a state is not an 'abstract entity' and that the acts of the state are in fact the acts of individuals and politicians who had the intention to exercise aggression (Schabas and Murphy 2017, 210). By connecting individual responsibility with the traditional understandings of aggression, the Tribunal broke through the then-existing barriers of the state's sovereignty in order to extend the responsibility for the committed crimes onto the individual as well (Carpenter 1995, 225).

The Tokyo Process and the International Military Tribunal for the Far East

The International Tribunal for the Far East began its sessions in 1946 and its activities were greatly based upon the work of the International Military Tribunal at Nurnberg (Sayapin 2014, 43). With the intention to convict the 28 accused, the International Military Tribunal for the Far East had confirmed the legal solutions foreseen by the Nurnberg processes in its entirety, holding tightly onto relevant opinions of the International Tribunal at Nurnberg, establishing another precedent relating to the establishment of the individual responsibility for the crime of aggression (Takana; McCormack and Simpson 2011, 150). The International tribunal has, with its interpretation, unambiguously confirmed that individuals, and not only countries, are responsible for the committed crimes.

However, what is distinctive to the Tokyo process is that the activities of the International Tribunal for the Far East underwent criticism from within, which is evident in the dissenting opinion of the Indian judge Radhabinod Pal, who characterized the Tribunal as a dangerous manifestation of 'victors' justice' and its legal basis as being incompatible with the international law (Sayapin 2014, 44). The reasons for this should be sought out in the fact that the principle of the working of the Nurnberg Tribunal was applied to the Tokyo process, discarding, however, the fact that the war acts of Japan and Germany are not completely the same, taking into consideration primarily the cultural and traditional mentality differences (Kaufman 2010, 756).

The Establishment of the United Nations and the UN Charter

Towards the end of the WWII, United Nations were formed as a certain successor in title of the League of Nations, which significantly contributed to the regulation of the use of force in accordance with the international law (Sayapin 2014, 46). After the establishment of the UN, the nature and the practice of the use of force which had to be regulated in accordance with the predicted demands established by the UN Charter, was altered (Gordon 1984, 274-275).

The Charter of the United Nations idealistically offers an international frame for the implementation of peace, however, primarily offering a legal frame of advocating human rights and freedoms. This way the Charter imposes itself as a legal basis of post-Nurnberg tendencies of criminalizing the crime of aggression (Sayapin 2014, 46). The UN Charter, regarding the domain that legally regulates the use of force, states how the signatories of the Charter commit themselves to refrain from threatening with force or using force, which is directed against the territorial integrity or political independence of any country, which will be addressed further on in the article by analyzing the core of the definition of the crime of aggression and its elements, as well as a detailed review on the importance of the mentioned article (United Nations 2018).

The United Nations General Assembly Resolution 3314 (XXIX) of 1974

The General Assembly Resolution 3314, which is a certain interpretation of the Article 2(4) of the UN Charter and which explicitly and concretely defines the crime of aggression, is adopted on the United Nations General Assembly session in 1974 (Sayapin 2014, 104). A part of the Resolution which relates to the crime of aggression primarily refers to the 1933 Soviet Union's Draft Definition of Aggression (Solera 2010, 821). The Draft served as a quality base for a more precise defining of aggression as a crime. In Article 1, the Resolution states how aggression signifies "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (Official Documents System of the United Nations, n.d.). In Article 3, the Resolution very concretely enumerates the acts of aggression to which it refers:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

However, it must be taken into consideration that the Resolution doesn't state the acts of aggression exhaustively, which is inter alia made clear in the Article 4, emphasizing how the exhaustive list is not of a definite nature, and in so doing, refers to the importance of the Security Council and its role of determining other acts which would compose aggression, in accordance with the provisions of the Charter of the United Nations.

The aforementioned Resolution was a guideline to the Security Council's intentions in insisting on acts that can be characterized as acts of aggression, and even though it did not have a binding force but had structural and substantial flaws (which will be discussed further),

it still represents a significant influence on the establishment of the Rome Statute of the International Criminal Court in 1998 and the efforts in defining the crime of aggression (Sayapin 2014, 104).

Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court was adopted on the diplomatic conference of the United Nations General Assembly in 1998 and is an international agreement with which the International Criminal Court was formed. The Statute establishes the functions, jurisdiction and the structure of the International Criminal Court. Simultaneously, the Statute encompasses four basic crimes; genocide, crime against humanity, war crime and crime of aggression. It was the very crime of aggression that presented a polarizing component of the Rome Statute (Weisbord 2008, 170).

During the activities of the diplomatic conference, the discussion imposed was regarding the requirement to add the term of crime of aggression in the text of the Statute, to which the majority of the countries present on the Conference agreed, while the USA and its closest allies were against (Gurule 2002, 4). The opposing parties emphasized the need to differentiate the applicable meaning (of the definition) of the crime of aggression and the procedural execution of jurisdiction over it (Sayapin 2014, 56-57). The opposing parties accentuated how it is unclear in what way will the committers of the crime of aggression be prosecuted if the very definition of the term is not precise and clear in its entirety. To them the manner in which the crime of aggression would be punished in relation to its definition was disputable.

Even though three different definitions of the crime of aggression were offered (Gurule 2002, 11), the participants of the Conference decided on a compromising solution stated in Article 5, Paragraph 2 of the Rome Statute which states how the Court "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime" (International Criminal Court 2018), meaning the foreseeable alterations and amendments of the Statute and its revision.

Although the Rome Statute offered an incomplete compromising understating of the crime of aggression, its importance is indisputable with the very fact that aggression was placed under the category of fundamental international crimes, especially considering how the epilogue of their forming was manifested in accepting the United Nations General Assembly Resolution's definition of the crime of aggression from 1974.

THE DEFINITION OF THE TERM OF THE CRIME OF AGGRESSION AND ITS ELEMENTS

Observing more thoroughly the historical overview of events which had a decisive influence on concretizing the term of crime of aggression, it is clear how the path towards a precise and concrete definition of that term was very exhaustive. In order to approach the analysis of the existing definition and key elements that define it, it is necessary to study key reasons due to which certain difficulties in defining the crime of aggression existed, their significance as well as their legal interpretation, which will be analyzed in more detail further on.

The Reasons of Inability to Clearly Define the Term of the Crime of Aggression

Since the beginning of the working of the International Military Tribunal at Nurnberg and the International Tribunal for the Far East, criminalization of aggression did not continue, while simultaneously, other fundamental crimes were present in various conventions (Cassese 2008, 154), such as war crimes which are regulated by the Geneva Conventions or genocide which is regulated by the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (United Nations Treaty Collection, n.d.). Historically speaking, the problem can be observed from various key moments, which this article analyses further on.

The Circumstances after the WWII

First of all, immediately after the end of WWII, in the period from 1945 till 1947, it had been relatively socially easy to punish those responsible for the war, taking into consideration that the victors punished the defeated. A necessity arose not only for the usual procedures which follow after a war (such as reparation), but also for a strict punishment of individuals who willingly participated in war and its planning (Cassese 2008, 154). With that it is evident how the consequences of WWII created suitable circumstances for punishing the responsible for the crime of aggression as well (in the notion and understanding that it had), alluding on to how the definition was sufficient in its then current form. It can be freely concluded how there was no need for a more concrete definition because the given circumstances didn't require it. The reason due to which this attitude changed later through time lies primarily within the desire to prevent crimes of aggression such as those seen in WWII.

The Problem of Permitting the Use of Military Force

The UN Charter in 1945 had established the future system of allowing and forbidding the use of military force. As such, in international relations it was forbidden with the annotation that it can be exceptionally used with the approval of the Security Council or in self-defense, as stated by the Article 51 of the Charter. The prohibition of military force as such was clear. The problem arose within the permission of the use of military force, more concretely within the predictable self-defense (Greig 1991, 366-367).

A question arose when would the use be permitted and under which conditions, bearing in mind that the very term of self-defense is very complex. The UN Charter somewhat concretizes the definition of self-defense through Article 51, defining it as an occurrence when an immediate near threatening danger exists, while on the other hand, the illegal self-defense portrays an attack that is undertook with the goal to anticipate the potential act of aggression.

Framing the term of self-defense consists of establishing exceptions from the rules of prohibiting the use of military force, because when self-defense if permitted, the prohibition of military force is not afflicted, and a state cannot be considered as an aggressor. However, at the same time it is necessary to notice how the sole term is insufficiently concretized since it is left to free interpretation. As it is an exception, it presents a permitted departure from the basic rule, and as such it aggravates the criminalization of aggression. Due to that, the lack of preciseness in this concrete case lead to the inability to clearly define the crime of aggression.

The Circumstances and the Period of the Cold War

Specific circumstances, which characterized the period of the Cold War, lead to the inability to clearly define the crime of aggression. Namely, neither of the blocks wanted to clearly define the term out of fear that it could be used in ideological and political battle between two sides (Cassese 2008, 155). The clear definition of the crime of aggression would, in that case, become one more asset of the conflict and taking this into consideration, the concretization of the term was not only unnecessary but potentially risky as well, therefore resulting in this terminological status-quo. On the other hand, it is important to mention how during the Cold War, the UN General Assembly Resolution in 1974 occurred nevertheless, despite the environment and the circumstances of that time, which leads to a positive shift in the attempt to define the crime of aggression and the deflection from the 'deadlock'.

Review of the Article 2(4) Of the UN Charter and the Significance of the Term of Force

The significance of the UN Charter was already mentioned earlier within the historical frame of building the term of the crime of aggression, however, its importance is also present in the modern international law, especially within regulating the use of force in international relations. Within the term of force lies the very core of the analysis of the crime of aggression, which is manifested in the Article 2(4) of the UN Charter, which also refers to the problem of permitting the use of force as one of the reasons of inability to clearly define the term of aggression (Sayapin 2014, 75).

If it is taken into consideration that the mentioned article of the UN Charter stated how all members "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Sayapin 2014, 29) (United Nations 2018), the necessity to approach a deeper analysis of the meaning of term force is irrefutable. Article 2(4) of the UN Charter represents one of the fundamental principles of the United Nations, and as such it didn't offer a qualification of the term of force, but the term is rather indirectly read from the related articles of the Charter (concretely the Articles 41 and 46 that mention the terms 'armed force' and 'armed forces'). Compliant to this, it could be concluded how the UN Charter primarily leans on the military aspect and the understanding of force which is strictly related to armed conflicts. It is indisputable how armed forces indeed do portray force, however, it is necessary to mention how force is not exclusively military, but also exists in forms of physical (but not military) and the so-called indirect force (Sayapin 2014, 81).

Physical force primarily refers to the force which uses means that are not standard in the classical military conflict (Ventura and Gillet 2013, 536). Non-military, physical force lacks the military element and the matter which is considered as 'conventional weapon', even though it often has deleterious consequences which can most certainly be compared to military armed conflicts. This is evident, especially taking into consideration the example of such force, which is manifested in modern terrorist attacks, where means that are not armed in the strictest sense are often used. Specifically, the use of vehicles such as airplanes and vehicles that could be defined as weaponry, since they are used as such, however, this is not their primary purpose (Sayapin 2014, 82).

On the other hand, indirect force refers to the technical and organizational interference of a country in international armed conflicts between other countries or within the territory of another country (Ventura and Gillet 2013, 537). The generality of the Article 2(4) of the UN Charter has neglected the ambiguity of the sole term of force, which is not surprising, having in mind the period when the Charter was adopted, nevertheless, this does not prevent nor does it narrow the area of expanding and building of the understanding the term within the given frames.

However, what mustn't be forgotten while analyzing the Article 2(4) of the Charter is that the Charter refers only to the prohibition of the use of force and withholding from it, while it simultaneously does not refer to the exceptions to the prohibition, which then refers to the argument of inability to define the crime of aggression, as was previously mentioned. It has already been stated how the problem is manifested in the question of permitting the use of force, more precisely, the concrete situations when the force can be used. The stronghold of these situations can be found in the Article 51 of the Charter which stated how the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" is not disputable and that the "measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

This confirms what has already been mentioned while stating the reasons for the inability to clearly define the crime of aggression – in general, force is prohibited with the exception that the right to a country's self-defense is not disputable, while the Security Council has a key role where it decides on the justification of the used force for the purpose of self-defense. On the other hand, this point to a certain limitation of the term of self-defense with the goal to prevent excessive and illicit force with the mechanism of placing certain supervision embodied in the institution of the Security Council. With this, countries have the possibility of using force within the boundaries given by the Security Council, since it finally decides what the boundary between the permitted and excessive force is.

The Question of Contradiction to the Legality Principle

Having in mind how the historical development of concretizing the crime of aggression, it becomes clear how the fact of contradiction of the crime of aggression to the legality principle contributes to the difficulty of establishing the definition (Ziskovich 2016, 384). In order to clarify the mentioned statement in the context of the crime of aggression, it is necessary to clarify the term of legality, that is, legality in general and afterwards to frame it within the understanding of the contradiction of the definition.

The legality principle refers to the legal tradition *nullum crimen sine lege*, that is, the principle on how there is no crime without law, implying how what is punishable is only that what is defined by the law. The sole purpose of the principle is depicted in the intention of preventing *ex post facto* law, avoiding the adoption of the law after a certain act is committed and with it adversely affecting the perpetrator. Legality is based on several general determinants; criminal acts must be a part of a written law, it is necessary to precise the criminal behavior and differentiate it from the permitted behavior, punishing mustn't be

retroactive in a way that the person subject to being responsible for the act that was not punishable in the time of its committing and the basis that one must not adhere to the analogy in applying criminal rules. The problem of affiliating legality with the crime of aggression is found in the fact how, unlike in the national legal systems, in the international criminal law the scope of the mentioned principle is unclear, and as such it was not explicitly formulated until the Rome Statute (Glennon 2010, 71). The principle is concretely mentioned in the Article 22 of the Rome Statute which states how an individual won't be criminally responsible unless his act was of criminal nature in the moment of its committing and how the principles, which define the criminal act, cannot be expanded, but rather interpreted restrictively. Taking into consideration the legality principle and the manner in which it had been stated in the Stature, as well as the already mentioned fact that the crime of aggression is a relatively new term, it is evident how a need to apply the doctrine of strict legality exists (of course, along with certain modifications which are present in the international law), which means that the definition of aggression itself must be clear and concise, with a clear emphasis on what is considered a criminal act and refraining from applying retroactivity (Ziskovich 2016, 384). The established thesis will further on be more concretely researched by analyzing the elements present in the definition of the crime of aggression.

Elements of the Crime of Aggression

Taking into consideration the ways in which the defining the crime of aggression was approached, from adopting the UN Charter all the way to the Rome Statute of the International Criminal Court, it can be concluded how the term of aggression is not uniform but rather consists of several key elements. More concretely, those are objective (*actus reus*) and subjective (*mens rea*) elements (Wang 2007, 307).

Objective Element of the Crime of Aggression

The objective element of the crime of aggression implicates the very exercising of acts which can be expressed as forms of aggression. Certain forms of aggression are characterized as illegal and/or criminal acts which are in accordance with those mentioned in the UN General Assembly Resolution 3314 in 1974, more specifically, in the part which refers to the definition of the crime of aggression (Cassese 2008, 158). The definition consists of a general part accompanied by an incomplete list of examples of acts of aggression, which have a purpose of clarifying the general provision (Sayapin 2014, 105).

As was already mentioned, the general part of the Definition stated how aggression is the use of armed forces of one country against the sovereignty, territorial integrity or political independence of another country, or is in any other way contradictory to the UN Charter. It is indisputable how the abstractness of the general provision is evident, however, it is

complemented by further provisions, which serve as examples of clarification, therefore, for instance, invasion or the attack of armed forces of one country on the territory of another, bombarding with armed forces the territory of another country, blocking the ports and shores of another country with armed forces, attack on land, air and marine forces of another countries are mentioned. Despite the fact that the provisions which state the examples of the crime of aggression are incomplete, a certain common characteristic of all mentioned examples is evident; the crime of aggression was never committed by one individual, but rather always resulted by collective action. A leader's individual responsibility in a political or military sense is not undermined, but it implies a thought-out planning and leadership of aggression by people who are present in the leader's narrow circle all the way to the executor of aggression, which only confirms the establishment of the existence of the mentioned collectiveness within the crime of aggression (Cassese 2008, 159).

Apart from referring to the UN General Assembly Resolution 3314, the definition given by the Rome Statute must also be mentioned, which claims in its definition how the crime of aggression consists of two main parts – the actions of the individual and the action of the state. Such division leads to the understanding how the state is the party that, in principle, has to execute the act of aggression, in order to ascribe to the individual, who is the citizen of that country, that he is the one that has also committed the act of aggression (Ziskovich 2016, 390).

In order for the acts of aggression to be considered as such, they must fulfill two conditions; a use of armed forces must be present and their usage must be directed against the sovereignty, territorial integrity or political independence of another country (Schachter 1984, 1621). Only in that context the individual's responsibility can be discussed, which is depicted by fulfilling cumulative conditions - that he prepared, initiated or executed an act of aggression, that he was in a position of power and that this act of aggression presents an obvious breach of the UN Charter (Ziskovich 2016, 391).

The first two conditions are somewhat clear and indisputable even though they are of vague nature, which cannot be said for the third condition of 'obvious breach of the UN Charter' that remains unexplained in the Rome Statute which does not find an interpretation for it. It is so because the UN Charter does not contain any provision that explains what exactly is considered by the breach of the Charter, and the fact that every country interprets the Charter and its possible breaching differently, is not without significance.

Subjective Element of the Crime of Aggression

Apart from the fact of the existence of the act of aggression and its execution as the objective element, the intention of committing the crime must exist as well (Cassese 2008, 159). This intention, in fact, represents the subjective element, which proves that the perpetrator had the will to participate in planning and/or carrying out the aggression and

was aware of the consequences, circumstances and the significance of committing such an act. The existence of the subjective element is of the utmost importance, because in that way a clear difference between the perpetrators who had the intention of executing the crime of aggression by themselves and those who were forced in any way to participate in aggression and cause its consequences. The Rome Statute further explains in the Article 30 how the individual will be considered responsible and punishable for the crime of aggression by the International Criminal Court if the objective elements of the crime of aggression are committed with intention and knowledge. The intention is seen when, in relation to the act, the individual has the aim to execute the act and there is knowledge and consciousness regarding what the consequence will cause. Therefore, it can be concluded how the *mens rea* element of the definition of the crime of aggression refers to the fulfillment of three elements; an individual as a potential aggressor has to have the intention of participating in the act, the intention to cause its consequences or at least be aware that they will happen in a normal sequence of events and have the awareness of the consequences (Ziskovich 2016, 396).

IMPLEMENTATION OF PUNISHING THE CRIME OF AGGRESSION AND ITS FUTURE IN THE INTERNATIONAL LAW

Keeping in mind the existing efforts in forming the definition of the crime of aggression, a question is posed regarding establishing jurisdiction over it and the legal future of regulating and criminalizing the crime of aggression in the international law. In order to come to certain conclusions or possibly to real anticipations of probable ways in which the jurisdiction over the crime of aggression will be procedurally executed, it is necessary to review through the role of the International Criminal Court and the Security Council as well as the accomplished progress in the recent assembly of member states of the Rome Statute in Kampala, what is accomplished to this moment.

The Role of the International Criminal Court and the Security Council in Determining Aggression

Up until this point it has been mentioned several times how the role of the UN Security Council is of great importance, especially as a key factor in verifying the justification of using the force, and generally through responsibility for maintaining the international peace and security, which is, after all, the basic task of the Security Council (Andrassy; Bakotić; Lapaš; Seršić and Vukas 2012, 160). This was made possible by the UN General Assembly Resolution 3314 from 1974, primarily focusing on the scope of activities of the Council and counting on its competence in solving the questions of violation of peace. However, it must be taken into consideration how the mentioned Resolution with its definition was adopted during the Cold War, which disabled a more precise defining of the definition of aggression.

With that, the question of vagueness of aggression stagnated until the end of the Cold War when the problem of defining aggression became current again, because even though the Resolution was influential and its importance undeniable, it lacked the context of punishing in the procedural sense (Van Schaack 2011, 511). Observing this, the deficiency of the Security Council as an institution which could solve the question of the crime in a concrete procedural way was evident, and a necessity to establish an institution which would be able to do so arose, finally coming to a conclusion in the form of the International Criminal Court. Since the International Criminal Court was formed, the role of the Security Council continuously collides with the assumed role of the International Criminal Court, which should, as a judicial body, act independently, disregarding the influence of political bodies and independent from the countries' approval which was, among other things, predicted by the Rome Statute (International Criminal Court 2018). The tendency towards compromising solutions satisfied both institutions and finally resulted in vague and unresolved definitions of the crime of aggression, that is, the inability to precisely determine the definition, and to the final postponing of any kind of concretizing the definition with alterations and amendments of the Rome Statute and its potential revisions which was, after all, determined by the Article 5(2).

The Conference in Kampala and the Amendments of the Rome Statute in 2010

The colliding role of the Security Council and the International Criminal Court regarding the question of jurisdiction of the crime of aggression was present also during the Revision conference in Kampala in 2010 when the amendments of the Rome Statute were discussed for the first time (Van Schaack 2011, 512). China, France, USA, United Kingdom and Russia along with several key allies advocated the standpoint that limitations should be imposed to the definition of the crime of aggression; especially in the opinion that the UN Charter demands that the Security Council should have an exclusive jurisdiction over the control of punishing the crime of aggression (Ambos 2010, 472). Such a view is understandable, taking into consideration which countries stated those demands. Contrary to the opinion of the mentioned five countries and their allies, many countries of the Latin America, members of the so-called 'African Group' and a significant number of European countries advocated for a broader definition of the crime of aggression along with which the judicial regime would be connected, which would be applicable even without the given acceptance by the countries, as well as the fact that it would be uninhibited by the UN Security Council decisions (Van Schaack 2011, 514).

The finally adopted amendments were greatly in accordance with the General Assembly Resolution from 1974, defining the crimes of aggression as they were stated in the Resolution, with a remark that the amendments will take effect one year after they will be ratified, and only the crimes of aggression committed one year or more after the thirtieth

ratification will fall within the jurisdiction of the International Criminal Court (International Criminal Court, n.d.). It was also decided by the amendments that the prosecutor can open the investigation procedure against the citizen of any country, while the prosecutor's own initiative does not refer to opening an investigation procedure against the country (International Criminal Court, n.d.). An important provision also refers to the fact that the prosecutor cannot act until the Security Council establishes that the crime of aggression occurred, implying the significant role of the Security Council and obeisance to the standpoint which supports its influence (International Criminal Court, n.d.).

In conclusion, what can be said for the modern definition of the crime of aggression is that it consolidates everything mentioned so far, beginning with the 1933 Soviet Union's Draft Definition of Aggression which was a template to the definition within the Resolution 3314 from 1974, out of which the latter is again an inherent paradigm to the last existing concretization of the crime of aggression, while respecting the importance which emerges from the UN Charter.

With these amendments of the Rome Statute, more precisely with the Article 8 *bis* paragraph 1, it is stated how the "'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (International Criminal Court, n.d.). The conformity with the Resolution from 1974 is further on evident through the paragraph 2 of the same article explaining how "'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c) The blockade of the ports or coasts of a State by the armed forces of another State;
d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The Future Implementation of the Amendments in the Context of the Activities of the International Criminal Court

The aforementioned provisions of the amendments, which refer to implementing the jurisdiction of the International Criminal Courts, still had a postponing nature, stating the obligation of adopting a decision on the real implementation of jurisdiction by a two-thirds majority on the eventual assembly of the member states of the Rome Statute after the 1st of January 2017. This obligation was fulfilled in December 2017, when the Assembly of the member states of the Rome Statute was held, with the assignment to activate the jurisdiction of the International Criminal Court over the crime of aggression deciding on the concrete date for applying jurisdiction over the crime of aggression to be the 17th of July 2018 (International Criminal Court, 2017).

Taking into consideration how the amendments of the Rome Statue on the Conference in Kampala were adopted, it is evident how it was no longer the question of defining, but rather of applying the definition; the member states have surprisingly achieved a consensus on the term of the crime of aggression; the problem of disagreement could possibly be manifested in the provisions concerning the carrying out the jurisdiction that the International Criminal Court would have over the crime of aggression due to the colliding relationship with the Security Council regarding that matter.

The existing provisions which refer to the jurisdiction were accepted also partly because the member states of the United Nations approached the defining of these provisions in a two-tier manner, dividing the question of jurisdiction on Article 15 *bis*, which explains the implementation of jurisdiction over the crime of aggression in the case of member states' referral and in the case of *proprio motu* investigations (that is, the investigations by the International Criminal Court's own request, more concretely, the prosecutor who initiates the investigation based on the information within the jurisdiction of the International Criminal Court) and, on the other hand on the Article 15 *ter* which refers to the implementation of jurisdiction over the crime of aggression in the case of Security Council's referral (Heinsch 2010, 734).

The main differences between the two articles is the fact that, in case of Security Council's referral, there is no need to determine the act of aggression, nor does the prosecutor have to wait for the determination. On the contrary, a special procedure is

established for the cases of member states' referral and *proprio motu* investigations, in which the prosecutor first must ascertain whether there is a determination of the act of aggression given by the Security Council, and if not, the prosecutor must wait six months before it can continue with the investigation (Ambos 2010, 472). It is evident from the given information how the role of the International Criminal Court in implementing jurisdiction over the crime of aggression is, tentatively speaking, not independent, but rather that there is an influence of not only the Security Council, but also the member stated of the Rome Statute. To clarify the above mentioned, one has to pay attention the paragraph 4 of the Article 15 *bis* which conditions the implementation of jurisdiction over the crime of aggression with the fact that the member state, for which it is established that it performed an act of aggression as is defined by the Rome Statute, can previously, thus prior to initiating the procedure, declare that it does not accept such jurisdiction, turning in the mentioned declaration to the scribe.

Further on, what must be taken into consideration is also the situation concerning the country that is not a member state of the Rome Statute. In that case, paragraph 5 of the Article 15 *bis* is relevant, which clearly states that the International Criminal Court won't exercise its jurisdiction over the crime of aggression when committed by the country's nationals or on its territory by the country that is not a party of the Rome Statue. Even though it is a relatively reasonable and logical provision, the legitimacy and jurisdiction of the International Criminal Court is put into question as well as the efficiency of punishing the crime of aggression, if the institution itself, responsible for exercising the carrying out the criminalization doesn't have a complete jurisdiction in that area.

CONCLUSION

The complexity of the process of precise defining the term of aggression is clearly evident when the complexity of events and legal activities through historical time frame are being analyzed. Despite the fact that this is a relatively new term, its determination went through continuous postponing of concretization, sometimes due to external factors of then current events and sometimes due to the pronounced collision of opinions of inability to form a consensus over the standpoint what should the crime of aggression encompass and what should its definition consist of.

In the intention of clarifying and clearly determining the crime of aggression, the importance of international organizations as well as legal acts adopted by them is evident; the significance of every single one of these acts is undeniable, because their adoption resulted in a certain continuous upgrading and concatenation of new acts onto previous ones, implying a certain agreement and confirmation of good functioning of institutions responsible for the acts nonetheless. With this, a path towards gaining a concrete and clear term of the crime of aggression is facilitated, regardless of the general difficulties which characterized the term and still do today.

The last efforts lead to a significant progress in determining the definition, however, it is important to comprehend how it most certainly isn't the final solution even though it represents a great step towards the goal. A significant challenge is still to come, and it consists of exercising the given definition into practice, where it will be viewed how exactly favorable is the current understanding of the definition of the crime of aggression and how is it applicable, not only theoretically, but in concrete cases as well. Such understanding is not at all restrictive, on the contrary, a wide scope of possibilities which are shown as solution while observing the functioning of the definition as it is defined today, favor and bring optimism for the final confrontation with the definition of the crime of aggression. 

REFERENCES

1. Ambos, Kai. 2010. "The Crime of Aggression After Kampala". *German Yearbook of International Law, Volume 53*.
2. Andrassy, Juraj, BožidarBakotić, DavorinLapaš, MajaSeršić, BudislavVukas. 2010. *Međunarodnopravo I. dio*. Zagreb: Školskaknjiga.
3. Andrassy, Juraj, BožidarBakotić, DavorinLapaš, MajaSeršić, BudislavVukas. 2012. *Međunarodnopravo II. dio*. Zagreb: Školskaknjiga.
4. Bartman, Christi Scott. 2011. "Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us". *Case Western Journal of International Law*.
5. Carpenter, A. C. 1995. "The International Criminal Court and the Crime of Aggression".*Nordic Journal of International Law, Volume 64, Number 4*.
6. Cassese, Antonio. 2008. *International Criminal Law*. Oxford: Oxford University Press, Second edition.
7. Crawford, James. 1994. "The ILC's Draft Statute for an International Criminal Court". *American Journal of International Law, Volume 88, Number 4*.
8. Glennon, Michael. J. 2010. "The Blank-Prose Crime of Aggression".*Yale Journal of International Law, Volume 35, Issue 1*.
9. Gordon, Edward. 1984. "Article 2(4) in Historical Context". *The Yale Journal of International Law, Volume 10, Issue 2*.
10. Greig, D. W. 1991. "Self-Defence and the Security Council: What Does Article 51 Require?".*The International and Comparative Law Quarterly, Volume 40, Number 2*.
11. Gurule, Jimmy. 2002. "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions". *Cornell International Law Journal, Volume 35, Issue 1*.
12. Heinsch, Robert. 2010. "The Crime of Aggression after Kampala: Success or Burden for the Future". *Goettingen Journal of International Law, Volume 2, Number 2*.
13. International Committee of the Red Cross. 2018. "Statute of the International Military Tribunal at Nürnberg (1945)".
14. International Criminal Court, n.d. "Amendments of the Rome Statute (2010)" Accessed February 20, 2018.
15. International Criminal Court. 2017. "Assembly activates Court's jurisdiction over crime of aggression." *International Criminal Court.*,December 15, 2017.https://www.icc-cpi.int/Pages/item.aspx?name=pr1350.
16. International Criminal Court. 2018. "Rome Statute of the International Criminal Court (1998)".
17. Kaufman, Zachary D. 2010. "The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations". *The John Marshall Law Review, Volume 43, Issue 3*.

18. Lavers, Troy. 2008. "(Pre)Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom". *Albany Law Review, Volume 71, Number 3*.
19. Lettonie – Russie - Traités et documents de base n.d. "Soviet Union's Draft Definition of Aggression (1933).", accessed April 26, 2018. http://www.letton.ch/lvx_33sdn.htm
20. Nasinovsky, Evgeny. 1968. "The Impact of 50 Years of Soviet Theory and Practice on International Law.". *American Society of International Law Proceedings*.
21. Official Documents System of the United Nations "United Nations General Assembly Resolution (1974), Article 1", accessed February 17, 2018. https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement
22. Paulus, Andreas L. 2004. "Peace through Justice – The Future of the Crime of Aggression in a Time of Crisis". *The Wayne Law Journal, Volume 50, Number 1*.
23. Sayapin, Sergey. 2014. *The Crime of Aggression in International Criminal Law; Historical Development, Comparative Analysis and Present State*. The Hague: Asser Press.
24. Schabas, William. A. and Shannonbrooke Murphy. 2017. *Research Handbook on International Courts and Tribunals.* Cheltenham: Edward Elgar Publishing.
25. Schachter, Oscar. 1984. "The Right of States to Use Armed Force". *Michigan Law Review, Volume 82, Number 5/6*.
26. Sellars, Kirsten. 2016. "The First World War, Wilhelm II, and Article 227: The Origin of the Idea of 'Aggression' in International Criminal Law". *Cambridge University Press.*
27. Solera, Oscar. 2010. "The Definition of the Crime of Aggression: Lessons Not Learned". *Case Western Reserve Journal of International Law, Volume 42, Issue 3*.
28. Takana, Yuki, Tim McCormack and Gerry Simpson. 2011. *Beyond Victor's Justice? The Tokyo War Crimes Trial RevisitedInternational Humanitarian Law Series*. Leiden: MartinesNijhoff Publishers.
29. United Nations. 2018. "Charter of the United Nations (1945)"
30. United Nations Treaty Collection. "Convention on the Prevention and Punishment of the Crime of Genocide in 1948".
31. University of Luxembourg n.d. "London Agreement 1945.", accessed February 2, 2018. https://www.cvce.eu/content/publication/1999/1/1/cc1beb97-9884-4aa1-b902-e897a8299bec/publishable_en.pdf
32. Van Schaack, Beth. 2011. "Negotiating at the Interface of Power and Law: The Crime of Aggression". *Columbia Journal of Transnational Law, Volume 49, Number*.
33. Ventura, M. J. and Gillet, M. 2013. "The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity" *Washington University Global Studies Law Review, Volume 12, Issue 3.*

34. Wang, X. 2007. "The Crime of Aggression under the Jurisdiction of the International Criminal Court".*Asia-Pacific Yearbook of International Humanitarian Law Volume 10, Number 3*.
35. Weisbord, Noah. 2008. "Prosecuting Aggression". *Harvard International Law Journal, Volume 49, Number 1*.
36. Ziskovich, Tal. 2016. "The Crime of Aggression: Should Aggression Be Prosecuted as a Crime in the ICC". *Military Law Review Volume 224, Number 2*.